Supreme Court, U.S.
FILED
051152 MAR 10 2006
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LAWRENCE D. NIELSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly held that the entry in this case violated the Fourth Amendment's knock-and-announce requirement and thereby required suppression of evidence seized pursuant to a valid warrant.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 415 F.3d 1195. The memorandum opinion and order of the district court (App., *infra*, 17a-28a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 2005. A petition for rehearing was denied on October 12, 2005. App., *infra*, 29a. On January 30, 2006, Justice Breyer extended the time within which to file a

petition for a writ of certiorari to and including March 10, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

An indictment returned in the United States District Court for the District of Kansas charged respondent with being a felon in possession of nine firearms and ammunition (Counts 1 and 2), in violation of 18 U.S.C. 922(g) and 924(a)(2); knowingly receiving, concealing, and storing stolen explosive materials (Count 3), in violation of 18 U.S.C. 842(h) and 844(a); and being a felon in possession of explosive materials (Count 4), in violation of 18 U.S.C. 842(i)(1) and 844(a). Before trial, the district court suppressed all the evidence seized from respondent's residence on the ground that officers executing the search warrant violated the knock-and-announce requirement. App., *infra*, 23a-28a. The court also rejected the government's arguments that the firearms and explosives were admissible under the good-faith, inevitable-discovery, or independent-source exceptions to the exclusionary rule. *Id.* at 26a-28a. The court of appeals affirmed. *Id.* at 1a-16a.

1. a. On August 21, 1999, at 11:30 p.m., officers from the Junction City, Kansas, Police Department executed a search warrant for drugs at the home of respondent and his girlfriend, Caroline Vigil. C.A. App. 15, 51, 74. The officers knocked and announced three times, each time waiting 15-20 seconds before they finally broke down the front door with a battering ram. *Id.* at 64, 74. When the officers entered they found respondent and Vigil standing between the kitchen and the living room at one end of the hallway and a clothes basket outside of the master bedroom at the other end of the hallway. *Id.*

at 30, 74. A loaded Thompson .45 mm handgun sat on top of the clothes basket. *Id.* at 53, 74. Inside the bedroom, they found a loaded Ruger revolver handgun between the mattress and the bed frame, and three rifles, one loaded, in a safe in the closet. *Id.* at 52-53, 74. They also found 41 grams of marijuana in the bedroom. *Id.* at 75. Respondent was charged in state court with possession of marijuana and possession of a firearm by a convicted felon; he pleaded no contest to misdemeanor possession of marijuana. *Id.* at 15.

b. Four years later, on August 12, 2003, the Junction City Police Department received an anonymous tip that respondent possessed an automatic weapon and marijuana at a new Junction City address. C.A. App. 33, 72-73. The caller said that the automatic weapon was in a loft in the garage and the drugs were in a work bench. *Id.* at 72-73. The officers confirmed that respondent and Vigil lived at the address in question and that the garage was attached to the house. They could not tell from the outside whether the garage was accessible from the house. *Id.* at 33-34. On October 7, 2003, the officers found marijuana seeds and five soiled cloth patches of the type used to clean firearms in respondent's trash. *Id.* at 32-33.

That same day, a Junction City officer sought a "no-knock" warrant at the request of officers who had participated in the 1999 search. C.A. App. 14-16, 26, 57-58, 60-63. One of those officers, Officer Mike Life, explained at the suppression hearing why he believed the entry needed to be unannounced:

> In 1999 my concern—what had occurred in that instance was it was a knock and announce warrant, which we knocked on the door several times and waited for somebody to respond. Nobody responded.

> We entered the residence, and [respondent] and Ms. Vigil were found between the hallway and the kitchen. It's a small residence. In that hallway was a laundry basket with clothes, and on top of that laundry basket was, I believe, like a .45 Thompson. So what appeared to me had happened was [respondent] had started to come down the hallway with a gun in his hand and left it in the hallway. So my concern was that we ran into that situation again and he would arm himself when the police arrived.

Id. at 61; see *id.* at 31, 52, 67-68. Officer Life further explained that he was concerned that respondent had kept multiple firearms in his bedroom in 1999:

> Because of the firearms the last—in '99 there were several firearms in the house. The majority of them were in the bedroom except for the one out in the hallway. And that instance in the hallway made me worried that we would have an armed confrontation, and so we wanted to avoid that at all costs. I mean, that's the number one priority is to make sure nobody gets hurt, including us or [respondent] or Ms. Vigil.

Id. at 63.

A Geary County District Judge issued a no-knock warrant authorizing a search for marijuana and drug paraphernalia on the afternoon of October 7, 2003, finding that "circumstances stated in the probable cause affidavit, and particular to this case, justify an exemption to the 'knock and announce' requirement governed by the Fourth Amendment." C.A. App. 14.

A team of officers executed the warrant without knocking and announcing at 4:45 a.m. the following day. C.A. App. 51, 56. Respondent and Vigil were in bed

when the officers entered. *Id.* at 55. The officers found a loaded Taurus .45 caliber handgun on the floor next to the right side of the bed and numerous large knives and bayonets on a night stand on the left side of the bed. *Id.* at 18. They also found seven other firearms in a bedroom closet safe, including a rifle that appeared to be fully automatic. *Ibid.* In addition to the guns, they seized assault rifle magazines, military rounds, and an artillery simulator from the bedroom and the garage. *Ibid.* The officers found marijuana and drug paraphernalia in the bedroom, the garage, and the kitchen. *Id.* at 17-18.

2. Respondent, a felon, was charged with four counts relating to his possession of the nine firearms and the explosive materials. Before trial, the district court suppressed everything seized from respondent's home.[1] App., *infra*, 17a-28a. The court found that the officers lacked the requisite reasonable suspicion for a no-knock entry. The court discounted the officers' belief that respondent had handled the loaded handgun in the laundry basket just before the entry in 1999: "This was based upon the idea that a clothes basket is an unusual place to keep a gun. But, it is speculation or a mere hunch that [respondent] or Vigil handled the gun after learning that the police were entering or seeking to enter their home in 1999." *Id.* at 24a. And the court found

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[1] Respondent's girlfriend, Caroline Vigil, was separately charged with two counts of making a false statement in acquisition of a firearm. On November 16, 2005, the district court (Judge Julie A. Robinson), suppressed evidence from the search in light of the court of appeals' decision in this case. The government has appealed that decision. C.A. No. 05-3477.

that under well-established Tenth Circuit precedent,[2] the presence of an automatic weapon in the garage was not sufficient to justify a no-knock search. *Id.* at 23a-24a. In light of this precedent, the court refused to apply the good-faith exception to the exclusionary rule. *Id.* at 26a. The court also rejected the government's argument that the independent-source and inevitable-discovery doctrines apply where the Fourth Amendment violation is an unannounced entry, choosing instead to "follow the majority of courts that have rejected the application of the inevitable discovery or independent source doctrine in this situation." *Id.* at 27a.

3. The court of appeals affirmed, upholding the district court's determination that "the police failed to demonstrate reasonable suspicion that in this particular circumstance knocking and announcing their presence would be dangerous or futile or would lead to the destruction of evidence." App., *infra*, 12a-13a. The court noted that prior decisions focused on past violent behavior or criminal history or the particular offense under investigation, such as narcotics trafficking with possession of a firearm, and that in this case there was no evidence of drug trafficking, "prior violent conduct," or "counter-surveillance activities." *Id.* at 10a-11a. With respect to the particular facts of this case, the court gave no weight to the officers' concern that respondent had picked up the loaded Thompson revolver in response

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[2] The court relied on *United States* v. *Moore*, 91 F.3d 96 (10th Cir. 1996), in which police officers broke down the door simultaneous with their announcement. In *Moore*, an informant told the officers that a crack dealer and another man on the premises "were armed with an unknown type of firearm." *Id.* at 98. The court of appeals held that "[t]he mere statement that firearms are present, standing alone, is insufficient" to justify a no-knock entry. *Ibid.*

to their knocks and announcement in 1999 and had thrown it into the laundry basket at the last second when they broke through the front door. Instead, the court emphasized that "the prior search of Nielson's home resulted in no violence, and despite his silent refusal to answer the door, he apparently cooperated after the police entered." *Id.* at 10a. The court further held that the automatic weapon in the garage did not provide a basis for an unannounced entry:

> Although the police had evidence that a firearm was present, that fact by itself does not demonstrate an increased risk beyond that normally faced by law enforcement officers, especially where, as here, their information was that a firearm was in a loft in the garage, and they had no information leading them to believe that [respondent] had interior access to the garage.

Id. at 10a-11a. Relying on circuit precedent indicating that the "mere statement that firearms are present, standing alone, is insufficient" to justify an unannounced entry, *id.* at 14a-15a (citing, *inter alia*, *United States* v. *Moore*, 91 F.3d 96 (10th Cir. 1996)), the court declined to apply the good-faith exception to the exclusionary rule.

The government filed a petition for rehearing en banc, in which it noted that it had not raised on appeal the question whether the independent-source and inevitable-discovery doctrines applied to permit the admission of the evidence in this case, but observed that this Court had since granted certiorari in *Hudson* v. *Michigan*, cert. granted, No. 04-1360 (June 27, 2005). The government requested that its petition be held for

Hudson. The court denied the government's petition for en banc review. App., *infra*, 29a.[3]

REASONS FOR GRANTING THE PETITION

The question presented in this case is whether the court of appeals correctly held that the exclusionary rule required the suppression of evidence seized pursuant to a valid search warrant where the executing officers entered the premises unannounced, believing that the facts gave rise to a reasonable suspicion of danger. Although respondent has opposed application of the good-faith, independent-source, and inevitable-discovery doctrines to a knock-and-announce violation, he has never disputed that the evidence seized pursuant to the warrant search—respondent's extensive cache of weapons and explosives—would have been discovered even if the officers had first knocked and announced their presence. Accordingly, this case presents the question now before the Court in *Hudson* v. *Michigan*, No. 04-1360 (argued Jan. 9, 2006), namely, whether the exclusionary rule requires the suppression of evidence that would have been discovered even if the officers had fully complied with the Fourth Amendment's knock-and-announce requirement.

The officers in this case had ample reason to believe that respondent was armed when they approached his

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[3] The court of appeals also denied the government's unopposed motion for a stay of the mandate, and the case returned to the district court. In the district court, the government sought a continuance of the trial date so that the Solicitor General could review the case and decide whether to seek review in this Court. The district court denied the continuance motion, and a motion to reconsider, and dismissed the indictment for want of prosecution. The government has appealed that dismissal, and that appeal is now pending in the Tenth Circuit. No. 06-3018.